Court of Appeals, State of Michigan

ORDER

People of MI v Gregory Earl Southward

Docket No. 249293

LC No. 02-022451-CC

Christopher M. Murray
Presiding Judge

Jane E. Markey

Peter D. O'Connell
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued August 19, 2004 is hereby VACATED. A new opinion is attached to this order.

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 28 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
v	No. 249293 Saginaw Circuit Court
GREGORY EARL SOUTHWARD, Defendant-Appellant.	LC No. 02-022451-FC

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of carrying a dangerous weapon with unlawful intent, MCL 750.226, two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, first-degree home invasion, MCL 750.110a(2), kidnapping, MCL 750.349, with five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b. He was sentenced as a second habitual offender, MCL 750.10, to 2 to 7½ years' imprisonment on the carrying a dangerous weapon conviction, 2 to 6 years' imprisonment for each felonious assault conviction, 14 to 30 years' imprisonment for the first-degree home invasion conviction, 20 to 50 years' imprisonment on the kidnapping conviction, 29 to 50 years' imprisonment for each CSC-I conviction, and to 2 years on the felony-firearm conviction, with the felony-firearm conviction to be served consecutive to, and before serving, the other sentences. All of the other sentences were to be served concurrently. Following a post-conviction motion, the court amended defendant's sentence for his felony-firearm conviction and ordered that it be served concurrent with his carrying a dangerous weapon conviction, but consecutive to the remaining sentences. We affirm.

Defendant's first argues on appeal that he was denied the effective assistance of counsel and that the trial court erred in denying his post-conviction motion for an evidentiary hearing on these claims. We disagree.

We address first defendant's argument that the trial court erred in denying his motion for an evidentiary hearing. On the record the trial court noted that it was the court's policy to deny a defendant's motion for an evidentiary hearing unless the Court of Appeals had remanded a case for such a hearing. This is an unsound policy which abdicates the trial court's duty.

Nonetheless, this Court has held that the absence of an evidentiary hearing is not fatal to a defendant's claim of ineffective assistance where the details of the alleged deficiencies are sufficiently contained in the record as to permit this Court to reach and decide the issue. *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985). While *Johnson* involved the defendant's failure to properly preserve his ineffective assistance claim by moving for an evidentiary hearing, we nonetheless believe that this rule of law applies equally to cases where a defendant is challenging a trial court's failure to grant a requested evidentiary hearing. If there is sufficient evidence on the record to permit this Court to reach and decide the issue, then the need for an evidentiary hearing is obviated. In this instance, the alleged errors are apparent from the record, and the record is sufficient for review.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While a trial court's findings of fact are reviewed for clear error, questions of constitutional law are reviewed by this Court de novo. *Id.* In order for a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To prove deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To prove prejudice, a defendant must affirmatively demonstrate a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Id.* at 302-303.

Defendant first asserts that trial counsel was ineffective because he incorrectly advised him that love letters the victim had sent him while he was in jail awaiting trial might not be admissible at trial, and that this mistake induced him to decide against using this evidence. The record, however, belies such a claim.

On the first day of trial, defense counsel noted on the record that defendant had specifically requested that he not introduce this evidence at trial, regardless of whether this evidence was admissible. Defendant then confirmed this decision, asserting that he did not believe this evidence would be useful in his defense. Subsequently, in a letter addressed to defendant's appellate counsel and attached to defendant's post-conviction motions, trial counsel stated explicitly that he had wanted to use this evidence at trial, but that defendant had insisted that he not do so. He also explained that he believed that defendant's decision had harmed his case. Thus, the record shows that not only did defendant himself make the decision to exclude this evidence, but also that this decision was contrary to trial counsel's own advice. Accordingly, defendant has failed to show that trial counsel's performance was deficient in regard to these letters.

Defendant further argues that trial counsel was ineffective in failing to introduce into evidence the fact that the victim had visited defendant while he was in jail awaiting trial in this case. But, the record also disproves this claim. In his letter to appellate counsel, referenced above, trial counsel indicated that he had wanted to use this information against the victim when she testified at trial, but that defendant had refused. Trial counsel further stated that he believed that his defense was handicapped by defendant's refusal to allow him to use this evidence. In

light of this evidence, defendant has once again failed to demonstrate that trial counsel's performance fell below an objective standard of reasonableness according to prevailing professional norms.

Defendant also argues that trial counsel was ineffective in failing to challenge or excuse a juror who had informed the court before opening statements that she had failed to disclose that she had been a victim of statutory rape. Here, too, however, defendant has failed to show that trial counsel's actions fell below the level of conduct constitutionally required of counsel. MCR 2.511(D) provides, in pertinent part, that the parties to a case may challenge jurors for cause if that person "is biased for or against a party or attorney . . .[,] shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be . . .[,] or has opinions or conscientious scruples that would improperly influence the person's verdict." MCR 2.511(D)(3)(4) & (5). In the present case, the juror here challenged came forward of her own, before any substantive part of the trial began, and advised the court that she had failed to disclose that she had previously been the victim of statutory rape. Upon questioning from the court and the attorneys, this juror explained that her concern was more that she should have disclosed this fact than that this history would affect her as a fact-finder. She stated unequivocally that she did not believe that this experience would affect her ability to be impartial in rendering a verdict in the present case. Under these circumstances, no basis existed for challenging this juror for cause. Counsel is not required to advocate a meritless position. *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000).

Moreover, trial counsel's failure to peremptorily challenge this juror also cannot form the basis of an ineffective assistance claim. This Court has recognized that the decision whether to exercise a peremptory challenge may be a matter of trial strategy. *People v Colon,* 233 Mich App 295, 301-302; 591 NW2d 692 (1998). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843. Further, this Court has noted that a failure to exhaust peremptory challenges involves a subjective judgment on the part of trial counsel, which can rarely, if ever, be the basis of a successful ineffective assistance claim. *People v Pawelczak,* 125 Mich App 231, 242; 336 NW2d 453 (1983). In light of this case law and the fact that defendant has failed to show that counsel lacked sound strategic reasons for retaining this juror, defendant has not sustained his burden of proving that trial counsel's performance in connection with this juror fell below an objective standard of reasonableness according to prevailing professional norms.

Defendant next argues that this Court will render appellate counsel ineffective if it denies defendant's request for an evidentiary hearing, because appellate counsel will be deprived of the ability to make a record that will allow him to raise critical issues on appeal. Because we have found that the record contains adequate details of the alleged deficiencies, this argument is without merit.

Defendant also argues that the trial court erred when it found that evidence of prior consensual sexual acts between the victim and defendant were irrelevant and, therefore, inadmissible. Again we disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the ruling made, *Snider, supra* at 419, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine,* 467 Mich 242, 250; 650 NW2d 659 (2002).

Evidence must be relevant to be admissible. MRE 402. MRE 401 defines relevant evidence as being that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, in order to be relevant, evidence must be both material and probative. *People v Crawford,* 458 Mich 376, 388; 582 NW2d 785 (1998). Evidence is material if it is related to any fact that is of consequence to the action. It is probative if it tends to make a fact that is of consequence to an action more or less probable than it would be without the evidence. *Id.* at 388-390.

Here, the proposed testimony related to sexual activity between the victim and the defendant during their marriage. Defendant asserted consent as his defense and sought to introduce this evidence to show that the victim had in the past willingly engaged in sexual acts with the defendant similar to those leading to the charges in this case, thus making it more probable than not the victim actually consented to the charged acts.

We agree that the proffered evidence is not probative of the issue of consent. The fact that while married to defendant, the victim willingly engaged in sexual acts similar to those giving rise to this case, has no bearing on whether she consented to engage in such acts after the marriage had ended. Consequently, the trial court did not abuse its discretion when it found that evidence of the victim's past sexual relationship with defendant was irrelevant and inadmissible.

Defendant next argues that the trial court violated defendant's constitutional rights when it barred him from introducing evidence of the victim's past sexual relations with defendant. Because of our finding that the trial court correctly found this evidence to be inadmissible, this issue is without merit.

Defendant also argues that the trial court erred in ordering defendant's felony-firearm sentence to run consecutive to his sentences for the other felony convictions because the jury was not required to specify during which, if not all, of the felonies it found defendant to have possessed the firearm for purposes of the felony-firearm charge. We disagree.

Whether the trial court erred in ordering defendant's felony firearm sentence to be served consecutively is a question of law reviewed de novo. *People v Clark,* 463 Mich 459, 463 n 9; 619 NW2d 538 (2000). But, necessary factual findings by the trial court at sentencing are

reviewed for clear error. MCR 2.613(C); *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

In *Clark*, our Supreme Court held that a felony-firearm sentence is to run consecutive only to the sentence for the underlying or predicate offense, not to all other felonies of which a defendant is convicted. The *Clark* Court specifically noted that the defendant was charged with fifteen weapon-related offenses, two counts of felony-firearm and two counts of possessing a bomb with unlawful intent, but the information only alleged that the felony-firearm offenses occurred in connection with the bomb possession. *Id.* at 460-461. Accordingly, the jury could have found only that the defendant had possessed a firearm while he possessed two bombs with unlawful intent and had not made specific findings as to whether the defendant had possessed a firearm while committing the other charged offenses. *Id.* at 464. The Court then stated that "[w]hile it might appear obvious that the defendant also possessed a firearm while committing the other crimes of which he was convicted, neither a trial court nor an appellate court can supply its own findings with regard to the factual elements that have not been found by a jury." *Id.* Important to the case at bar, however, is that the *Clark* Court also noted that a prosecutor has considerable charging discretion, and "the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts." *Id.*, n 11.

Consistent with the discretion noted in *Clark*, here, the information charged defendant with possession of a firearm during commission of the charges of "felonious assault and/or home invasion and/or kidnapping an/or criminal sexual conduct first degree." Thus, potentially all of the charged crimes, except the possession of a dangerous weapon with unlawful intent charge, could have formed the underlying or predicate offense(s) for defendant's one felony-firearm charge. In instructing the jury on the felony-firearm charge, the court repeated the "and/or" language from the information; but, the jury was not required to, and did not, specify which of the underlying offenses it found defendant to have committed while in possession of the firearm.

This Court addressed this same issue in *People v Welch*, unpublished opinion of the Court of Appeals (#241083, dec'd November 25, 2003).[1] Like the instant case, the prosecutor in *Welch* had charged multiple predicate felonies in a single count of felony firearm. The *Welch* Court opined:

> We read . . . footnote [11 in *Clark*] as endorsing the practice of linking multiple predicate felonies to a single felony-firearm charge, allowing the sentence on that single felony-firearm count to be consecutive to all of the listed predicate felonies for that felony-firearm count. In the case at bar, the cocaine and the receiving and concealing charges were linked as predicate felonies to the felony-firearm count. Therefore, it was appropriate to make the felony-firearm sentence consecutive to both of these sentences. *Welch, supra*, slip op at 3.

[1] Another Saginaw circuit court case.

Although not binding precedent, MCR 7.215(C)(1), we find *Welch* persuasive and conclude that because the jury found defendant guilty of each predicate felony to which the felony firearm charge was linked, the trial court correctly imposed consecutive sentencing. MCL 750.227b(2); *Clark, supra* at 464 n 11.

Last, defendant argues that the trial court erred in sentencing him as a second habitual offender based on a misdemeanor conviction in North Carolina. Again, we disagree. Like other sentencing issues, this one presents mixed questions of law and fact; the former we review de novo, the latter for clear error. *Babcock, supra* at 264, 273 ¶¶ 10, 11.

We first note that the trial court correctly ruled that under Michigan law a crime labeled a "misdemeanor" under the Penal Code, but which is punishable by more than one year imprisonment, is a "felony" under Michigan's Code of Criminal Procedure for purposes of the habitual offender statutes. *People v Smith*, 423 Mich 427, 443; 378 NW2d 384 (1985); *People v Daniel*, 207 Mich App 47, 55; 523 NW2d 830 (1994). Defendant does not dispute this ruling, but argues that under *People v Quintanilla*, 225 Mich App 477; 571 NW2d 228 (1997) there is no evidence in the record from which the trial court or this Court could conclude that that offense of which defendant was convicted in North Carolina, "assault on a female," would have been "a felony or attempt to commit a felony in this state if obtained in this state." MCL 769.10. Contrary to defendant's argument, the *Quintanilla* Court held that "the facts of the out-of-state crime, rather than the words or title of the out-of-state statute under which the conviction arose, are determinative." *Quintanilla, supra* at 479.

Here, the information alleged that defendant was convicted in North Carolina on January 13, 1987 of the felony second-degree rape. The presentence report, to which neither defense counsel nor defendant objected regarding the accuracy of defendant's criminal history, disclosed that although originally charged with second degree rape, defendant plead guilty to "assault on a female." North Carolina records admitted at defendant's post-sentencing show that although this offense is labeled a misdemeanor in North Carolina, it provided for a maximum of two years imprisonment. See *State v Gurganus*, 39 NC App 395, 399-400; 250 SE2d 668 (1979). In fact, the records reveal defendant was sentenced to two years imprisonment, suspended, and three years supervised probation. The North Carolina offense would therefore clearly satisfy Michigan's definition of "felony" for purposes of being an habitual offender based on its penalty. *Smith, supra.*

Moreover, although the North Carolina offense is unknown to Michigan, the record supports a conclusion that the "facts of the out-of-state crime" would constitute a felony if committed in Michigan. *Quintanilla, supra* at 479. "Assault on a female," is obviously a sexually related offense. Under North Carolina law, only a male over the age of eighteen may commit the offense upon a female. *Gurganus, supra*. Although under North Carolina law, assault on a female is not a lesser-included offense of attempted rape, *State v Wortham*, 318 NC 669; 351 SE2d 294 (1987), yet here, the records show defendant's conviction arose out of a sex offense, second degree rape. In Michigan, an assault committed with the intention of committing CSC is either a five-year or ten-year felony. MCL 750.520g. Accordingly, applying either the

legal penalty test or the underlying facts test, the trial court did not err by concluding defendant's North Carolina conviction for "assault on a female" supported application of MCL 769.10.

We affirm.[2]

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell

[2] We received and reviewed defendant's Standard 11 brief. All the issues he raises are either cumulative or meritless, so we have not addressed them separately.